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No. 73-671

In the

Supreme Court of the United States

OCTOBER TERM, 1973

MAYER PAVING AND ASPHALT COMPANY, an Illinois corporation, and LEE O. MAYER, sole surviving partner of Mayer Paving Company, a co-partnership,

Petitioners,

vs.

GENERAL DYNAMICS CORPORATION, a Delaware corporation, and MATERIAL SERVICE CORPORATION, a Delaware corporation,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit.

MOTION FOR LEAVE TO FILE OUT-OF-TIME PETITION FOR REHEARING

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Petitioner respectfully moves for leave to file the annexed petition for rehearing of the order of this Court denying the petition for writ of certiorari in this case, entered on January 14, 1974. No timely petition for rehearing was filed inasmuch as no grounds for such a petition then existed. But rehearing is sought at this

time because, as it pointed out more fully in the annexed petition for rehearing, an order of this Court granting certiorari in *Gulf Oil Corporation, et al.* v. *Copp Paving Company, Inc. et al.* which raises issues identical to those raised in the instant case was entered by the Court on March 25, 1974.

Although this petition for rehearing is filed after the expiration of the time prescribed in Rule 58(2), the grounds upon which it is based arose after such time. This Court clearly has power, in its discretion and in the interests of justice, to entertain the petition in these circumstances. See *United States* v. *Ohio Power Co.*, 353 U.S. 98; *Gondeck* v. *Pan American World Airways*, 370 U.S. 918.

Respectfully submitted,

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PETITION FOR REHEARING

The petitioner herein respectfully moves this Court for an order (1) vacating its denial of the petition for writ of certiorari, entered on January 14, 1974, and (2) granting the petition. As grounds for this motion, petitioner states the following:

I. THE GRANT OF CERTIORARI IN GULF OIL CORPORATION UNION OIL COMPANY OF CALIFORNIA, et al. v. COPP PAVING COMPANY, INC. et al., No. 73-1012, October Term, 1973.

On March 25, 1974, following the denial of certiorari in the instant case, this Court granted certiorari in *Gulf Oil Corporation, Union Oil Company of California, et al.* v. *Copp Paving Company, Inc., et al.*, No. 73-1012, October Term, 1973.

The instant case involves substantially the same question of law regarding the commerce requirements under §2(a) of the Robinson-Patman Act, 15 U.S.C. §13(a), as is involved in *Gulf Oil* v. *Copp*. In both cases, plaintiffs complained of discriminatory pricing in the sale of a principal ingredient used in the construction of roads and highways. In *Copp* the Ninth Circuit held that intrastate sales of such ingredient satisfied the commerce requirements of the Robinson-Patman Act because the highways were instrumentalities of Interstate Commerce. The identical issue was resolved against plaintiff in the instant case. Petitioner filed a Supplemental and Reply Brief in connection with its petition for a writ of certiorari calling the Court's attention to the Ninth Circuit's Opinion in *Copp* and detailing the identity of issues involved in *Copp* and in this action. Petitioner respectfully refers the Court to that Reply wherein the relevance of *Copp* to the instant action is thoroughly discussed.

The identity of issues in the instant case and the *Copp* case amply justifies a reconsideration of the denial of certiorari here. In fact, it would be appropriate for this Court to hear and consider the instant case when it hears and considers the *Copp* case. The appropriateness is underscored, moreover, because of the confusion created

under the Robinson-Patman Act by the conflicting Circuit views as to the commerce requirements under that act expressed in the instant case, *Copp*, and *Littlejohn* v. *Shell Oil Co.*, 483 F.2d 1140 (5th Cir., 1973).

For these reasons, therefore, the denial of certiorari should be reconsidered to the end that this case be heard and resolved simultaneously with the *Copp* case.

CONCLUSION

For the reasons set forth above, as well as those contained in the petition for writ of certiorari, petitioner prays that this Court grant rehearing of the order of denial, vacate that order, grant the petition and review the judgment and opinion below.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

As counsel for the petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay is restricted to the ground specified in Rule 58(2).

/s/ Francis J. McConnell
Francis J. McConnell